

UNPUBLISHED
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CENTRAL DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JUAN SERENO ARREOLA and
HOMERO BUSTOS FLORES,

Defendants.

No. **CR02-3015MWB**

REPORT AND RECOMMENDATION
ON DEFENDANTS' MOTIONS TO
SUPPRESS

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I. INTRODUCTION

This matter is before the court on motions to suppress evidence (Doc. Nos. 19 & 23) and supporting briefs (Doc. Nos. 20 & 24) filed April 24, 2002, by the defendants Juan

Sereno Arreola (“Sereno”) and Homero Bustos Flores (“Bustos”). On May 3, 2002, the plaintiff (the “Government”) filed a combined brief resisting both defendants’ motions (Doc. No. 27). Pursuant to the trial scheduling order entered March 11, 2002 (Doc. No. 4), motions to suppress in this case were assigned to the undersigned United States Magistrate Judge for the filing of a report and recommended disposition.

The court held a hearing on the motions on June 28, 2002, at which Assistant United States Attorney C.J. Williams appeared for the Government; Sereno appeared in person with his attorney, Assistant Federal Defender Priscilla Forsyth; and Bustos appeared in person with his attorney, Alexander Esteves. The Government offered the testimony of Iowa State Troopers Justin Simmons and Chris Callaway.

The following exhibits were admitted without objection from any party: Gov’t Ex. 1, a videotape of the traffic stop at issue; Gov’t Ex. 2, “Government’s Transcript [of the videotape] with Revisions by Federal Public Defender”; Gov’t Ex. 3, “Transcript [of the videotape] prepared by Hal Sillers, International Translation Service”; Gov’t Ex. 4, a consent-to-search form signed by Defendant Sereno, with English translation; and Defense Ex. A, a police report prepared by Trooper Simmons concerning the traffic stop at issue in the defendants’ motions.

The court has reviewed the parties’ briefs and carefully considered the evidence, and now considers the motions ready for decision.

II. FACTUAL BACKGROUND

The same factual background is relevant to both defendants’ motions. On February 27, 2002, immediately before Trooper Simmons was scheduled to go on duty at 3:00 p.m., he received a telephone call from Trooper Callaway telling him to be on the lookout for a black Pontiac Grand Am with Minnesota plates bearing license number DGT 348. Special Agent Tim Shanley of the Minnesota Bureau of Criminal Apprehension

had called Trooper Callaway to report that the vehicle in question was believed to be traveling on I-35, carrying three Hispanic occupants who were suspected of transporting narcotics.

Trooper Simmons went on duty at 3:00 p.m., and performed routine duties for the next several hours. At 9:10 p.m., he saw a small, dark-colored car traveling southbound on I-35. The car was in the left-hand lane, passing a semi-truck that was in the right-hand lane. Trooper Simmons turned on his radar and clocked the car at 70 mph in a 65 mph zone. He was curious as to whether this might be the vehicle Trooper Callaway had mentioned, and because the vehicle was speeding, Trooper Simmons decided to stop the vehicle. When he began pursuit, the vehicle slowed down and pulled into the right-hand lane, allowing the semi-truck it had just passed to then pass the vehicle.¹ Trooper Simmons stopped the vehicle and confirmed that the license number and description matched the vehicle described to him by Trooper Callaway.

Trooper Simmons approached the passenger's side window, and saw there were two occupants in the vehicle. He told them why they had been stopped, and asked the driver for his license, registration and insurance verification. While the driver was retrieving his documents, Trooper Simmons observed the interior of the vehicle. He saw a couple of blankets and several fast-food wrappers in the back seat, and a couple of tubes of silicone caulk in a mesh pocket attached to the front seatback. He also noticed a cell phone, a phone antenna on top of the car, and the strong odor of Bounce fabric softener inside the car.²

¹Trooper Simmons testified that when he begins to pursue a vehicle, it is not unusual for the vehicle to slow down or take other action in an attempt to make it appear no traffic violation has taken place.

²The trooper explained silicone caulk is often used to cover up or seal hidden compartments in vehicles. He stated that Bounce and similar fabric softeners often are used to try to mask the smell of narcotics.

The driver produced a Minnesota driver's license identifying him as Sereno, and some insurance papers. The passenger, Bustos, retrieved some of the papers from the glove box, and Trooper Simmons noticed Bustos's hands were shaking. Officer Simmons asked Sereno to come back and sit in the patrol car. The trooper called in Sereno's driver's license information, and while he was awaiting a response, he and Sereno engaged in casual conversation. The trooper could understand Sereno, for the most part, and Sereno appeared to the trooper not to have trouble understanding English.³

Sereno said he had been in Des Moines, Iowa, looking for an apartment because he planned to move to Des Moines to find work. Trooper Simmons said he had a friend in Des Moines, and asked Sereno in what areas of town he had been looking. Sereno was unable to identify any specific area of town where he had looked at apartments.

Trooper Simmons asked Sereno about ownership of the vehicle because the paperwork he had provided indicated it was owned by someone else. Sereno said his cousin or another family member had bought the car from a Mr. Cortez, and he bought the car from that cousin or family member. Sereno did not give the trooper a phone number for Cortez, and he could not produce any paperwork to verify that he was the vehicle's owner.

In the meantime, Trooper Callaway had driven to the scene after hearing Trooper Simmons call in the vehicle's license number. When he arrived, Trooper Callaway sat in the back seat of Trooper Simmons's patrol car and listened to the conversation between Trooper Simmons and Sereno for a few minutes. The insurance papers Sereno had provided were for a different vehicle, and Trooper Callaway got out of the patrol car and went up to talk to Bustos to see if he could find any other insurance papers inside the car. Bustos

³The court's review of the videotape indicates that although Sereno and Trooper Simmons had occasional difficulty understanding one another, for the most part, they carried on a normal conversation, in English.

asked Trooper Callaway to push down on the passenger's window to help it go down, and the trooper said it was difficult to get the window down.⁴

While Bustos looked for the insurance papers, Trooper Callaway talked to Bustos briefly. Bustos said he and Sereno had gone to Des Moines to meet girls. He later said they were looking for jobs in Des Moines. Trooper Callaway testified Bustos "seemed unusually nervous," and his nervousness appeared to increase each time the trooper spoke to him. Trooper Callaway noticed a strong smell of fabric softener emanating from the car. He also noticed the silicone tubes, blankets, fast-food wrappers, and cell phone, as well as a very small plastic baggie in the glove box that was visible when Bustos opened the box to look for the insurance papers.

About half an hour after Trooper Simmons had stopped the vehicle, Bustos finally located the appropriate insurance verification inside the vehicle. Trooper Callaway took the insurance verification back to Trooper Simmons's patrol car, and again sat in the back seat. Once Trooper Simmons had verified that Sereno had proper insurance, he completed a warning ticket, had Sereno sign the ticket, returned all Sereno's paperwork, and told Sereno he was free to leave. As Sereno was preparing to leave, but before he had actually opened the door of the patrol car, Trooper Callaway mentioned to Sereno that he had seen the little plastic bag in the glove box,⁵ and he asked Sereno if there were any illegal narcotics in the car. Sereno said there were no drugs in the car, responding negatively when Trooper Callaway specifically mentioned marijuana, cocaine, methamphetamine and heroin. Sereno said there were no guns in the car, and nothing illegal of any kind.

⁴Trooper Callaway stated that in his experience, drugs often are stored inside a vehicle's doors, preventing the windows from rolling down as they should.

⁵Trooper Callaway testified the plastic baggie was about the size of a postage stamp, and was empty.

Trooper Callaway asked, “Can we search the car?” and Sereno answered, “Sure.” Trooper Callaway stated five to ten minutes had elapsed from the time Bustos found the proper insurance papers in the car, and only about one minute had elapsed from the time Trooper Simmons issued the warning and told Sereno he was free to go, to the time when Trooper Callaway asked Sereno for consent to search the car.

Trooper Callaway asked if Sereno could read Spanish, and Sereno said he could. Trooper Callaway handed Sereno a consent-to-search form in Spanish, on which the trooper had written the car’s license plate number (DGT 348) and the words “and contents.” Sereno began to read the form, and the following exchange took place between Sereno and Trooper Simmons⁶:

SERENO: What’s this for, DG?

SIMMONS: That’s the license plate, DGT 348.

SERENO: Oh, oh. Oh, sure, sure.

SIMMONS: Um, and if you want, you can sign on there. . . . No, I’m not making you sign that, understand you don’t have to sign that. You know what I’m saying? I’m not making you sign that.

SERENO: Uh-huh.

SIMMONS: Okay?

SERENO: Oh. Oh, you, you gonna check the (unintelligible) for something is wrong or you wanna check the car plates?

SIMMONS: No, no. I put the plates because that’s what car it is.

SERENO: Uh-huh.

SIMMONS: That – the DGT 34 . . . that’s the car.

SERENO: Oh, yeah.

SIMMONS: Okay.

⁶Trooper Callaway was still sitting in the back seat of Trooper Simmons’s patrol car. Sereno and Trooper Simmons were sitting in the front seat.

SERENO: You want to check the car, oh.

SIMMONS: Yeah.

SERENO: Oh, you want me to sign that?

SIMMONS: Right there, if you'd like to. . . .

Sereno signed the consent form. Trooper Simmons stated Sereno did not appear nervous and did not object in any way to the troopers searching the car. Trooper Callaway testified he believed it was clear to Sereno that the troopers intended to search the car, and there was no confusion about their intentions.

Trooper Simmons testified that prior to beginning the search, his suspicions had been raised by the following factors: (1) the vehicle's owner was not present; (2) Sereno was not sure who had given him the car, saying he thought he had gotten it from a cousin, who had gotten it from a Mr. Cortez; (3) the driver and passenger were from different states; (4) fast food wrappers in the car; (5) cell phone in the car; (6) Sereno did not know where he had been in Des Moines; (7) Bustos's hands were shaking; (8) Sereno was especially talkative; (9) the car had a booster antenna for the cell phone; (10) the small plastic baggie in the glove compartment; and (11) the strong odor of fabric softener in the car.

Trooper Callaway asked Bustos if he would go back and sit in the patrol car while the troopers searched the vehicle. Trooper Simmons showed Sereno and Bustos how to honk the horn if they wanted to get the officers' attention, and showed them how to adjust the heat in the patrol car. The patrol car doors were not locked, and the defendants were not in handcuffs or otherwise restrained.

Inside the car, the troopers found some caffeine pills, a cell phone, a key chain with a religious icon, and two tubes of silicone caulk. The blankets in the back seat smelled strongly of fabric softener, as though they had been soaked in fabric softener. Trooper Simmons removed a plastic molding from the area where the passenger's right foot would rest. He noticed the sheet metal had a jagged edge and looked like it had been cut. He

could see a cavity underneath the sheet metal but could not see all the way into the cavity. He also noticed the rocker panel had been cut, exposing another cavity that was only partially visible. In the trunk of the car, the troopers found a spare tire that appeared to be flat; however, when they lifted the tire, it felt heavier than they would expect a spare tire to feel. They also found some tools, black electrical tape, a floor jack, two cans of expanding foam, and a green bag.

By this point, the troopers' suspicions had been raised further due to the following additional factors: (1) the flat, yet heavy, spare tire; (2) the cans of expanding foam and silicone caulk; (3) the tools and black electrical tape; (4) the floor jack; (5) the caffeine pills, which Trooper Simmons stated may indicate the driver has been up and driving for a long time; (6) the religious key chain, which the trooper said narcotics traffickers often will carry to make officers think they are Christian people; (7) Sereno's and Bustos's conflicting stories about why they had been in Des Moines; and (8) the compartments cut into the car.⁷

The troopers asked Sereno if they could take the car to a safer location to look through it further, and Sereno agreed. They took the car to the DOT shop. When they arrived, the troopers handcuffed the defendants to a chair, but told them they were not under arrest. After they resumed their search, the troopers found receipts indicating Sereno had been out of state during the time he said he had been in Des Moines. Inside the spare tire, the troopers found three black, taped packages containing a total of approximately four pounds of methamphetamine.

III. DISCUSSION

⁷Although Trooper Simmons testified the troopers did not find an air freshener or fabric softener in the car, the police report (Def. Ex. A) indicates they also found a "[w]omen's fragrance spray air freshener," and the presence of the spray air freshener was another indicator that made the troopers suspect the defendants might be hauling narcotics.

A. The Parties' Arguments

Sereno asserts six grounds for his motion to suppress the methamphetamine found the car, to-wit: (1) Sereno was detained and questioned for more than 30 minutes before the warning ticket was issued, constituting an unreasonable detention; (2) Trooper Callaway's questions to Sereno in the patrol car after Sereno had been told he could leave constituted a continued illegal detention; (3) Sereno's consent to the search was not voluntary because it was tainted by the illegal detention and questioning; (4) when no contraband was found in the roadside search, the continued detention of Sereno for some four hours while the troopers continued the search was unreasonable and illegal; (5) the troopers lacked probable cause to seize the car and transport it to another location to continue searching, and Sereno's consent to the continued search was not voluntary in that he "did not understand what was going on"; and (6) the methamphetamine discovered in the search was tainted by Sereno's illegal detention and the illegal seizure of the vehicle. (Doc. No. 19)

Bustos argues the evidence should be suppressed because "nothing had transpired after the initial traffic stop that would have created reasonable, articulable suspicion of criminal activity beyond the reason for which the motor vehicle was stopped." (Doc. No. 23) He claims the initial search constituted an unreasonable seizure, and furthermore, once no contraband was found in the initial search, the continued detention of the defendants and the vehicle for the further search also was unlawful. (*Id.*)

The Government argues the initial detention of the defendants prior to issuance of the warning ticket was reasonable; Sereno voluntarily consented to the search of his car; once the troopers found the hidden compartments cut into the car, they had probable cause to search and no further consent was required; and Bustos lacks standing to challenge the search. (Doc. No. 27)

B. Bustos's Standing to Challenge the Search

The court first will address Bustos's standing to challenge the search of the car. "A defendant moving to suppress evidence on the basis of an unlawful search bears the burden of proving that he had a legitimate expectation of privacy that was violated by the challenged search." *United States v. Gwinn*, 191 F.3d 874, 878 (8th Cir. 1999) (citing *United States v. Muhammad*, 58 F.3d 353, 355 (8th Cir. 1995)). To establish a legitimate expectation of privacy, "the defendant must demonstrate (1) a subjective expectation of privacy; and (2) that the subjective expectation is one that society is prepared to recognize as objectively reasonable." *United States v. Muhammad*, 58 F.3d 353, 355 (8th Cir. 1995) (citing *United States v. Stallings*, 28 F.3d 58, 60 (8th Cir. 1994)).

Factors relevant to the determination of standing include: (1) ownership; (2) possession and/or control of the area searched or item seized; (3) historical use of the property or item; (4) ability to regulate access; (5) totality of the circumstances surrounding the search; (6) existence or nonexistence of a subjective anticipation of privacy; and (7) objective reasonableness of the expectation of privacy considering the specific facts of the case. *United States v. Gomez*, 16 F.3d 254, 256 (8th Cir. 1994) (citing *United States v. Sanchez*, 943 F.2d 110, 113 (1st Cir. 1991)); *United States v. McKibben*, 928 F. Supp. 1479, 1484 (D.S.D. 1996)).

At the hearing on the defendants' motions, the court held Bustos had standing to contest the search. To explicate that ruling, the court first notes Bustos clearly had standing to challenge the initial stop of the vehicle, and if the stop had been unconstitutional, he would have had standing to challenge the search as the product of an illegal traffic stop. *See United States v. Green*, 275 F.3d 694, 699 (8th Cir. 2001). However, neither defendant claims, and the record does not indicate, that the initial traffic stop was unconstitutional, and the court specifically finds Sereno was speeding, making the traffic stop valid. *United States v. Lyton*, 161 F.3d 1168, 1170 (8th Cir. 1998) ("Any traffic violation, even a minor one, gives an officer probable cause to stop the violator.").

Nevertheless, even though Bustos “lacked a possessory or property interest in the motor vehicle that would enable him to directly challenge the search, he may still contest the lawfulness of his own detention and seek to suppress evidence as the fruit of his illegal detention.” *United States v. Green*, 275 F.3d 694, 699 (8th Cir. 2001) (citing *United States v. Kreisel*, 210 F.3d 868, 869 (8th Cir. 2000); *United States v. DeLuca*, 269 F.3d 1128, 1133 (10th Cir. 2001)). As the *Green* court explained:

A passenger has standing to challenge his detention because all occupants of a stopped vehicle are subject to a Fourth Amendment seizure. *Michigan Dep’t of State Police v. Sitz*, 496 U.S. 444, 450, 110 S. Ct. 2481, 110 L. Ed. 2d 412 (1990). Such a stop affects an occupant’s interest in freedom from random, unauthorized, investigatory seizures. *Delaware v. Prouse*, 440 U.S. 648, 653, 99 S. Ct. 1391, 59 L. Ed. 2d 660 (1979). “The interest in freedom of movement and the interest in being free from fear and surprise are personal to all occupants of a vehicle, and an individual’s interest is not diminished simply because he is a passenger as opposed to the driver when the stop occurred.” *United States v. Kimball*, 25 F.3d 1, 5 (1st Cir. 1994).

Id. Thus, Bustos has standing to contest his detention and the search in this case, and the Government’s argument to the contrary is overruled.

C. Length of Detention

The defendants argue they were detained for an unreasonable length of time prior to issuance of the warning ticket to Sereno. However, the evidence shows the delay was due to Sereno’s failure to produce valid insurance information for the vehicle he was driving until about 30 minutes into the traffic stop. The uncontroverted evidence shows only five to ten minutes elapsed from the time the correct insurance documents were located until Trooper Simmons gave Sereno the warning ticket and told him he was free to go. Ten

minutes is not an unreasonable length of time to prepare and issue a warning ticket. Therefore, this argument is without merit.

Sereno argues further that Trooper Callaway's questioning after the warning ticket was issued and Sereno was told he was free to go constituted an unreasonable detention. The court finds no merit in this claim. Immediately after Trooper Simmons told Sereno he was free to go, Trooper Callaway asked if there were any drugs in the car. In the scope of a traffic stop, in addition to asking for a driver's license, registration and the like, "[a]n officer may properly expand the scope of his investigation as reasonable suspicion dictates. . . . To evaluate reasonable suspicion, '[w]e look to the totality of the circumstances, in light of the officer's experience.'" *United States v. Foley*, 206 F.3d 802, 807 (8th Cir. 2000) (citations omitted). In the present case, the officers had received a tip that a vehicle matching the description of the one being driven by Sereno, even down to the license plate number, might be transporting narcotics. The troopers had observed a number of factors, listed above, that raised their suspicion somewhat. Viewing the totality of the circumstances, the court finds Trooper Callaway's brief questioning of Sereno was reasonable and did not constitute an illegal detention.

Bustos's argument that the officers lacked a reasonable, articulable suspicion of criminal activity sufficient to ask for consent to search the vehicle must fail for similar reasons. "A trained officer may properly infer from a collection of circumstances, no one of which itself indicates illegal activity, that further inquiry is appropriate." *United States v. Ramos*, 42 F.3d 1160, 1163 (8th Cir. 1994). The troopers' experience and training "had informed them that the listed factors were consistent with and indicative of drug courier characteristics." *United States v. Carrate*, 122 F.3d 666, 669 (8th Cir. 1997) (citing *Ramos, supra*). The court finds the officers had a "reasonable suspicion sufficient to permit further questioning." *United States v. Martinez*, 168 F.3d 1043, 1047 (8th Cir. 1999) (citing *Ramos, supra*; *United States v. McManus*, 70 F.3d 990, 993 (8th Cir. 1995)).

D. Consent to Search

The only remaining issue in the defendants' motions is whether Sereno gave a valid consent to the search of his vehicle. If his consent was voluntary and not the result of any illegal detention or lack of comprehension, that ends the inquiry. There is no indication he ever withdrew his consent, or that Bustos ever objected to the search. After the search began and the troopers found evidence of hidden compartments in the car, consent was no longer necessary because they had probable cause to continue their search.

The court has found, above, that no illegal detention occurred. The court further finds that Sereno's consent was voluntary and uncoerced. Thus, the only potential problem with Sereno's consent is whether he understood that he was consenting to a search of the entire car. The court finds Sereno understood the question, "Can I search your car?" and his answer, "Sure," constituted consent to search the entire vehicle. Once Sereno had given verbal consent to the search, no written consent was required; the verbal consent was sufficient to permit the troopers to search the vehicle. Any ambiguity in the written consent form did not operate to qualify or restrict the scope of the consent. In fact, Trooper Simmons went farther than the law requires in telling Sereno he did not have to sign the consent form. See *United States v. Palacios-Suarez*, 149 F.3d 770, 773 (8th Cir. 1998) (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 231, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973)).

"The Fourth Amendment test for a valid consent to search is that the consent be voluntary, and '[v]oluntariness is a question of fact to be determined from all the circumstances[.]'" *Ohio v. Robinette*, 519 U.S. 33, 39, 117 S. Ct. 417, 421, 136 L. Ed. 2d 347 (1996) (quoting *Schneckloth*, 412 U.S. at 248-49, 93 S. Ct. at 2059). In the present case, Sereno gave verbal and written consent to the search. Neither defendant honked the horn to get the troopers' attention or otherwise asked that the search be stopped. The officers reasonably believed they had permission to search the vehicle. Considering all the

circumstances, the court finds Sereno's consent was voluntary. *See United States v. Sanchez*, 32 F.3d 1330, 1333 (8th Cir. 1994).

Having so found, all the remaining arguments raised by the defendants must fail. As noted above, once the troopers found evidence the car had been altered to create hidden compartments, and especially taken together with the other factors that were present and known to the troopers, the court finds they had probable cause to detain the vehicle for a further search, even if Sereno withdrew his consent.

IV. CONCLUSION

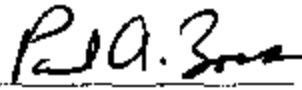
Considering the totality of the circumstances, the court finds no basis to sustain either of the defendants' motions to suppress. The evidence was obtained lawfully, and was not tainted by any illegal detention or illegal seizure of the vehicle.

Therefore, for the reasons discussion above, **IT IS RECOMMENDED**, unless any party files objections⁸ to the Report and Recommendation in accordance with 28 U.S.C. § 636(b)(1)(C) and Fed. R. Civ. P. 72(b), within ten (10) days of the service of a copy of this report and recommendation, that Sereno's and Bustos's motions to suppress (Doc. Nos. 19 & 23) be **denied**.

IT IS SO ORDERED.

DATED this 17th day of July, 2002.

⁸Objections must specify the parts of the report and recommendation to which objections are made. Objections also must specify the parts of the record, including exhibits and transcript lines, which form the basis for such objections. *See* Fed. R. Civ. P. 72. Failure to file timely objections may result in waiver of the right to appeal questions of fact. *See Thomas v. Arn*, 474 U.S. 140, 155, 106 S. Ct. 466, 475, 88 L. Ed. 2d 435 (1985); *Thompson v. Nix*, 897 F.2d 356 (8th Cir. 1990).

A handwritten signature in black ink, appearing to read "Paul A. Zoss", is positioned above a horizontal line.

PAUL A. ZOSS
MAGISTRATE JUDGE
UNITED STATES DISTRICT COURT